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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

KAREN M.,

Plaintiff and Respondent,

v.

VINCENT P.,

Defendant and Appellant.

B284763

(Los Angeles County
Super. Ct. No. BF057616)

APPEAL from orders in the Superior Court of Los Angeles County. Dianna Gould Saltman, Judge. Affirmed.

Vincent P., in pro. per., for Defendant and Appellant.

Levin and Margolin, Elyse R. Margolin and Ksenya G. Kogan, for Plaintiff and Respondent.

Appellant Vincent P. (Vince) and respondent Karen M. (Karen) each filed a request for a domestic violence restraining order under the Domestic Violence Prevention Act (DVPA). (Fam. Code, § 6200 et seq.)¹ The trial court granted Karen's request and denied Vince's. Vince contends the trial court abused its discretion by denying a restraining order against Karen. Vince further claims the court erred in requiring him to surrender his passport to his counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Karen and Vince met on January 28, 2015, and started a romantic relationship soon after. Karen became pregnant with their daughter, who was born in January 2016, when Karen and Vince were living together.

After multiple incidents of domestic violence over many months, a frightened Karen finally called the police, in Colorado, where the most recent incident had occurred. After the police spoke with Karen and Vince, Vince was arrested. Karen obtained a protective order. Additionally, a temporary custody order was put into place and Vince's visitation with their daughter became monitored.

Thereafter, a Petition to Establish Parental Relationship was filed in California.² This Petition commenced the proceeding in which the cross-petitions for restraining orders arose.

¹ All undesignated statutory references are to the Family Code except as otherwise indicated.

² The petition itself is not part of the record on appeal; it is unclear which party filed it. By referring to the child as "their daughter," we do so for convenience and do not express an opinion on the paternity action.

Initially, Vince and Karen each filed petitions for temporary domestic violence restraining orders. Both orders were granted. In his petition, Vince requested a change in the parties' child custody order. The matter was placed on calendar on June 15, 2017 for hearings on the restraining orders. The evidence presented at the restraining order hearing covered six incidents over the course of ten months. Both Vince and Karen testified. Karen's testimony was corroborated by a forensic injury expert, a cellphone forensic expert, and other witnesses.

At the close of the hearing, court explained the reasons for its ruling at length on the record. Thereafter, trial court issued a conforming statement of decision, in response to Vince's request.

Although the court concluded that Karen had not met her burden of proof as to some incidents, overall the court believed Karen about multiple events and disbelieved Vince. As to a number of occasions, the court not only found Karen credible but expressly found Vince's "explanation of events not credible." The court entered a restraining order against Vince, but not against Karen. The court also granted temporary legal custody of their daughter to Karen with slight modifications to Vince's visitation schedule.

The court found that Vince did not pose a substantial flight risk with the child; however, the court ordered Vince to turn his passport over to his attorneys, during the pendency of the paternity action. The court instructed that, if either party wishes to leave the United States with the child, "then counsel will need to be informed of that," and the parties can address it at that time. The court concluded that this unilateral restriction on Vince's passport was appropriate because only Vince was a perpetrator of domestic violence, and there was a risk that he

might leave the jurisdiction with a child too young to refuse to go with him.

Vince filed a timely notice of appeal.

DISCUSSION

1. Governing Authority

On appeal, Vince does not challenge the entry of a restraining order against him and in favor of Karen; he simply argues that the trial court erred in not issuing mutual Domestic Violence Restraining Orders. A brief discussion of the policies behind the law governing such mutual orders is appropriate.

Under the DVPA, a court may issue a restraining order to prevent domestic violence or abuse if the party seeking the order “shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.” (§ 6300.) “Abuse” includes intentionally or recklessly causing or attempting to cause bodily injury, to place a person in reasonable apprehension of imminent serious bodily injury; or stalking, threatening, harassing, telephoning, contacting, coming within a specific distance of, or disturbing the peace of the other party. (§§ 6203, 6320.)

A court shall not issue a mutual restraining order unless “(1) [b]oth parties personally appear and each party presents written evidence of abuse or domestic violence in an application for relief using a mandatory Judicial Council restraining order application form,” and (2) “[t]he court makes detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” (§ 6305, subd. (a).)

Section 6305 appears to reflect a legislative policy that mutual restraining orders are disfavored and may not be used to avoid the often difficult determination of who was the primary

aggressor and who acted in self-defense in cases that often are tried without corroboration. Mutual restraining orders often stigmatize the real victim by placing blame equally when it should be unilateral. (*Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 738.)

“In 1996, the Judicial Council of California Advisory Committee on Gender Bias in the Courts (the committee) issued a final report that found that ‘mutual restraining orders create difficult enforcement problems’ because the police often do not know whom to arrest if there is a subsequent altercation and may end up arresting both parties or neither party. Moreover, ‘the committee received convincing testimony that victims of domestic violence who have not engaged in an act of violence are confused, humiliated, and degraded by orders restraining them from such conduct.’ Some witnesses ‘reported that mutual restraining orders give victims the message that they are being blamed.’ According to the committee, ‘[p]erhaps a potentially volatile courtroom situation is diffused somewhat by issuing orders against both parties, but respect for the law is undermined.’ (Judicial Council of Cal., Advisory Com. on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts, Final Report (July 1996) <<http://www.courtinfo.ca.gov/programs/access/documents/f-report.pdf>> [as of Jan. 11, 2006].)” (*Monterroso v. Moran, supra*, 135 Cal.App.4th at p. 738.)

The factfinding process required by section 6305 is critical to the implementation of these policies. As this court stated in a slightly different setting, “Permitting courts to avoid making the required findings in circumstances where each party’s allegations of abuse arise from a different incident risks undermining central policies behind the factfinding requirement added to section 6305

in 1995: ensuring courts do not issue mutual orders as a matter of expediency, or simply because an abused party, in order to get their own protection, yields to their abuser’s request for a mutual order.” (*Melissa G. v. Raymond M.* (2018) 27 Cal.App.5th 360, 372.)

Under section 6305, subdivision (b), in determining whether both parties acted primarily as aggressors, the court must consider the provisions found in Penal Code section 836, subdivision (c)(3). “The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, the officer shall consider (A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defense.” (Pen. Code, § 836, subd. (c)(3).)

The Family Code does not define self-defense, but the Civil Code describes self-defense as any necessary force “to protect from wrongful injury the person or property of oneself, or of a spouse, child, parent or other relative” (Civ. Code, § 50.) In *J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 976, the court applied this definition of self-defense in a DVPA context, noting that “[i]n a suit for assault and battery, the defendant is not liable if that defendant reasonably believed, in view of all the circumstances of the case, that the plaintiff was going to harm him or her and the defendant used only the amount of force reasonably necessary to protect himself or herself. [Citation.]”

2. Standard of Review

We review a denial of a protective order under the DVPA for an abuse of discretion. (*Gonzalez v. Munoz* (2007)

156 Cal.App.4th 413, 420 (*Gonzalez*.) In considering the trial court’s findings of fact supporting the denial of a protective order, we apply the substantial evidence standard of review. Under the substantial evidence test, the question is whether “ ‘there is any substantial evidence, contradicted or uncontradicted, supporting the trial court’s finding.’ ” (*Burquet v. Brumbaugh* (2014)

223 Cal.App.4th 1140, 1143.) We must accept as true all evidence in favor of the judgment. (*Id.* at p. 1143.) We give deference to the trial court’s determinations of credibility and evidence. (*In re Alexandria P.* (2016) 1 Cal.App.5th 331, 354.)

We also consider whether the trial court’s application of the law to the facts exceeded the bounds of reason; we will uphold the trial court’s decision so long as it is reasonable. (*Gonzalez, supra*, 156 Cal.App.4th at p. 420.) The trial court’s application of the law to the facts is reversible only if its determination is arbitrary, capricious, or patently absurd. (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 334.)

As we have observed, Vince does not appeal the *granting* of the domestic violence restraining order in Karen’s favor. Vince’s principal argument on appeal is that the trial court wrongfully *denied* a restraining order in his favor.³ Thus, Vince is asking us to find that, even though he had the burden of proof on his request for a restraining order, the trial court erred in not granting what would be a mutual restraining order. To do so, we apply the substantial evidence standard but we utilize a slightly different analytical framework: “ ‘[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of

³ We address his separate claim that the court should not have limited the use of his passport *post*.

the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' [Citation]." (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466.)

As Vince does not contest that the restraining order against him was proper, he, at least tacitly, concedes he was a "primary aggressor" under section 6305. Thus he is asking this court to determine as a matter of law that the only reasonable interpretation of the evidence is that Vince and Karen were each a "primary aggressor" under the statute. Even the most cursory review of the evidence establishes that he has failed to meet this burden on appeal.

3. Vince Has Failed to Establish the Only Reasonable Interpretation of the Evidence is That Karen was a Primary Aggressor

We consider the evidence of each incident separately.

A. February 2016 – Vince Alleges Karen Scratched his Chest

Vince testified that Karen dug her fingernails into his chest while the two were arguing. Karen denied scratching him, and the trial court concluded there was insufficient evidence of domestic violence in this incident. The court found that Vince did not meet his burden of proof. We will not second guess the trial court's credibility finding. Based on Karen's denial, that finding was supported by substantial evidence.

B. March 2016 – Thermostat Argument When Vince Choked Karen

Karen testified that, one morning in March 2016, she went into the living room with their daughter, and checked the thermostat because she was freezing and their daughter's hands were cold. She asked Vince why the thermostat was set so low; he responded, "use your fucking common sense and put some clothes on." She started screaming at him in reply. He then came into the living room and grabbed Karen by the throat for a few seconds. Their daughter was about five feet away sitting in her chair. Karen was able to breathe and did not notice any marks, but she was fearful. The trial court found Karen's testimony that Vince grabbed her by the neck credible, and found Vince's denial not believable. Again the trial court had a credibility determination to make and expressly found Vince's "explanation not credible."

C. July 2016 – Vince Alleges Karen Grabbed and Pulled his Arm

Vince testified that Karen grabbed and pulled his arm during the course of an argument. Karen denied the allegation, and the trial court concluded there was insufficient evidence of domestic violence. The court found that Vince did not meet his burden of proof. We cannot say a contrary finding was compelled as a matter of law.

D. August 2016 – Vince Keeps Karen's Cellphone from Her

In August 2016, while on a road trip, Karen and Vince arrived in Priest River, Idaho. One night, Karen was texting her mother when Vince came into the bedroom and asked to use her phone to check something on the internet. Instead of accessing

the internet, Vince began looking at Karen's personal messages, demanding to know what she was hiding from him. Karen tried to get her phone back, and accidentally scratched Vince on his wrist. At the DVPA hearing, Karen testified that a month earlier, Vince had threatened to stay in Boise with their daughter, and he was again threatening to take her with him. Karen panicked. She testified that, without her cellphone, she had no means of getting help at the isolated Priest River house. The record is unclear as to how Karen retrieved her phone from Vince, but it is undisputed that she did. Once she had her phone, Karen decided not to call the police because Vince had not hurt her or removed their daughter. The trial court found Karen's testimony that Vince prevented her from accessing her phone and obtaining help credible, and found Vince's explanation that he was reading her texts to practice learning her native language (Portuguese) not believable.

Again, there is no basis for us to conclude the court's credibility determination was erroneous. The court's implied finding that any scratches she may have inflicted were in self-defense was well-supported. (See *In re Marriage of G.* (2017) 11 Cal.App.5th 773, 781 [finding sufficient evidence of self-defense to use reasonable force in response to the spouse's attempt to take property by force].)

E. October 4, 2016 – Fight Over Cellphone and Vince's Arrest

On October 4, 2016, while in Boulder, Colorado, Karen and Vince had another argument in which Vince threatened to leave with their daughter. According to Karen, she became concerned and called her mother; Vince asked who she was calling, lunged forward and grabbed Karen's leg so she could not move, and

quickly hung up her phone. He held, scratched, and twisted her arm in the process. After a long struggle, Karen retrieved her phone and considered calling the police, but she was afraid that picking up the phone would set him off again. After the fight, Vince attempted to photograph his back, claiming that Karen had hurt him in the struggle. She testified that any injuries to Vince were in self-defense.

The next morning, Karen left the house to call her mother, then called the police because she was again fearful that Vince would abscond with their daughter. The police arrived; they spoke with Karen; she showed them her injuries, and they arrested Vince.

At the hearing on the petitions for retraining orders, Vince claimed that Karen had bloodied his back during their struggle, but there was evidence Vince never asked for medical attention, nor did he show the police his claimed injuries. In fact, Vince denied having any injuries when asked. The trial court found Karen's testimony credible and Vince not credible. Specifically, the court found that Vince was interviewed for 13 minutes by police and did not tell them of any injuries, and when expressly asked he denied being injured.

On appeal, Vince contends that the evidence shows that Karen was a primary aggressor because she scratched his back. However, the court reasonably relied on contrary evidence, which showed Vince did not report to the police that he was injured, and expert testimony which demonstrated that the purported scratches Vince claimed could not have been inflicted by Karen's fingernails.

F. December 25, 2016 – Vince Claims Karen Created a Pretext so he Would Violate the Protective Order

On December 25, 2016, Karen arrived at Vince's apartment complex because Vince had a monitored visit scheduled. Vince claimed that Karen was outside his residence, holding their daughter in an unsafe manner in which her body was not fully supported, in order to taunt him or to try to provoke him into violating the protective order she had against him.

Karen testified that she had arrived early, so decided to take their daughter for a walk around the apartment complex, and stopped in front of a tree to watch a squirrel eating nuts. Unbeknownst to Karen, the tree was actually in front of Vince's apartment, and he saw them outside. Vince took the position that Karen's presence in front of his apartment was an attempt to goad him into violating the protective order. But when Karen started to walk away to meet the monitor, Vince gestured for her to come closer, making no attempt to retreat into his residence. The trial court found that the encounter was merely an unfortunate coincidence, and that Vince's claim of harassment was belied by his request that Karen stay.

The trial court reasonably found that Karen was unaware of the exact location of Vince's apartment unit; and found Karen's explanation credible. Although Vince claimed he was being harassed by Karen, the court reasonably disbelieved his testimony finding that Vince had "beckoned her to stay."

4. Requiring Vince to Surrender his Passport was Not an Abuse of Discretion

There is little authority directly addressing whether a court may order a party to surrender his or her passport as part of a domestic violence restraining order. Here, the trial court ordered

Vince to turn his passport over to his counsel as a means of preventing him from leaving the jurisdiction with the parties' young child, whose custody Vince sought to modify in this proceeding. In general, the court has the power to enter such an order, ancillary to the restraining order. (See § 6322 [allowing the court to make any order enjoining a party from specified behavior if necessary to effectuate its domestic violence restraining order]; § 6340, subd. (a)(1) [specifically requiring the court to consider whether any such order is necessary for the safety of a child whose custody or visitation is at issue in the proceeding].)

The question then becomes whether the court abused its discretion by ordering Vince to turn his passport over to his counsel. In the context of both the protective order and the custody modification, we conclude that the court acted within its discretion. The court's order imposed a minimal restriction on Vince's liberty, requiring only that he give his passport to his attorney, to guarantee that Karen will receive notice if he intends to leave the country with the child. This restriction was justified by Vince's repeated threats to take the child away with him.

Vince's threats to take the child away themselves constituted harassment. Even if Vince never seriously intended to take the child away, his threats to do so were a form of emotional abuse, disturbing Karen's peace by constantly reminding her that he had the means to disappear with her child. Harassment and disturbing the peace can be enjoined by a domestic violence restraining order (§§ 6320, subd. (a), 6340, subd. (a)(1)) and they were, in fact, enjoined in the restraining order issued after hearing in this case. We believe that the court was within its discretion to take the teeth out of Vince's threats

by requiring him to turn over his passport, and effectuate this portion of the restraining order. (§ 6322.)

DISPOSITION

The trial court's orders are affirmed. Respondent to recover costs on appeal.

RUBIN, P. J.

WE CONCUR:

MOOR, J.

KIM, J.